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No. 03-339

In The Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE CENTER FOR JUSTICE AND ACCOUNTABILITY, NATIONAL CONSORTIUM OF TORTURE TREATMENT PROGRAMS, AND INDIVIDUAL ATCA PLAINTIFFS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

This suit raises the question of whether survivors of grave violations of customary international law will be foreclosed from bringing civil actions against their perpetrators under the Alien Tort Claims Act ("ATCA"), 28 U.S.C.A. §1350, a statute enacted over 200 years ago, which has provided the crucial opportunity for survivors to seek justice. *Amici curiae* are committed to preserving the ATCA as a potential avenue for survivors of egregious violations of customary international law to seek redress in U.S. courts.

Amici curiae include individual survivors of gross human rights violations who have filed suit against their abusers under the ATCA as well as organizations dedicated to serving survivors of torture and other acts of severe violence, listed in Appendix A.

This case will determine whether a key avenue for obtaining a measure of justice for victims of international atrocities – including genocide, crimes against humanity, war crimes, slavery, arbitrary detention, and disappearances – will remain available. As survivors of these abuses and organizations that provide counseling and other forms of assistance to those injured by these horrors, *amici curiae* have a vital interest in the outcome of this case.

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. This brief was written by counsel for *amici curiae* with the assistance of Adam Day, Catherine Meza, and Volinka Reina, students at the University of California (Boalt Hall). No person or entity other than the *amici curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties have consented to the filing of the brief of *amici curiae*. Petitioner's letter of consent has been lodged with the Court. The letter of consent of the United States accompanies this brief.

SUMMARY OF ARGUMENT

Our purpose in submitting this brief is to offer our perspective based on our first-hand experience as survivors of violations of customary international law and organizations of professionals who assist such survivors. We hope to enlarge the discussion on the merits to include the unique and profound implications which the pursuit of justice through ATCA suits has exerted on the survivors of unimaginable horrors and on their communities.

Amici curiae have experienced the enormous challenges survivors of serious violations of customary law face. Their injuries endure for years – if not for life – often exacerbated by a sense of powerlessness and injustice that the perpetrators are living in the United States with impunity. ATCA cases have provided a judicial remedy consistent with international law principles that enables survivors to break the silence surrounding their abuses, to restore their dignity and sense of control over their lives by securing judicial acknowledgment of the horrors they endured, and to achieve a measure of justice against those responsible for their suffering.

The ATCA is the only judicial remedy available for mass and systematic violations such as genocide and crimes against humanity, as well as for war crimes, slavery, arbitrary detention, religious persecution, and other egregious atrocities. In addition, ATCA suits promote the U.S. interest to hold perpetrators of gross human rights violations accountable. ATCA litigation helps U.S. officials identify and remove wrongdoers present in the country illegally and may stimulate anti-impunity and more general rule of law efforts in the countries from which the abusers came. *Amici curiae* urge the Court to maintain the opportunity for survivors to benefit from the critical effects on individuals and communities that the ATCA's judicial remedy affords.

ARGUMENT

I. The ATCA Is Consistent with the Well-Recognized Principle of International Law that States Are Obligated to Provide a Remedy for Gross Human Rights Violations.

The ATCA promotes enforcement of human rights norms and is consistent with the obligation of states under international law to provide a remedy for gross human rights violations.[2] The United States has supported the

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[2] For example, the Universal Declaration of Human Rights, article 8, provides "a right to an effective remedy by the competent national tribunals for acts violating . . . fundamental rights." Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). In addition, article 2(3) of the International Covenant on Civil and Political Rights requires states "to develop the possibilities of judicial remedy," and "to ensure that the competent authorities shall enforce such remedies when granted," and article 9(5) specifically states that "[a]nyone who has been the victim of an unlawful arrest or detention shall have an enforceable right to compensation." G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. The United States has ratified the Covenant. U.S. Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2003*, at 294 (2003). Moreover, the U.N. Special Rapporteur on Reparations has proposed that every state provide a remedy to victims of gross human rights violations. United Nations, Economic and Social Council, Commission on Human Rights, The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission Resolution 1999/33, annex, art. 2 at 7, U.N. Doc. E/CN.4/2000/62 (2000). The Proposed Guidelines, to be considered at the 60th session of the Commission on Human Rights, establish reparation norms including that, in establishing remedies for victims of gross human rights violations or serious violations of humanitarian law, states "shall ensure that their domestic law is consistent with their international obligations" and that victims "shall have effective access to a judicial remedy." United Nations, Economic and Social Council, Commission on Human Rights, The Right to a

(Continued on following page)

international trend to develop mechanisms to hold accountable those who violate these most basic norms. In the aftermath of World War II, the United States was a key participant in the trials of Nazi war criminals in Nuremberg and Japanese war criminals in Tokyo. M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 1-9 (2d ed. 1999).

More recently, in the early 1990s, the United States assumed an active role in creating the *ad hoc* International Criminal Tribunal for the Former Yugoslavia to try individuals suspected of genocide, war crimes, and crimes against humanity in the Balkan conflict. Virginia Morris & Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* 30-35 (1995). It also supported the creation of the International Criminal Tribunal for Rwanda to prosecute individuals suspected of participation in the 1994 genocide in that country. Human Rights Situation in Africa: Hearing Before the Subcomm. on Africa of the House Comm. on Int'l Relations, 104th Cong. 44-53 (1995) (written testimony of the Hon. John Shattuck, Ass. Sec. of State, Bureau of Democracy, Human Rights and Labor).

The ATCA enables the United States to promote accountability for prescribed categories of universally condemned practices by offering survivors the opportunity to file tort actions against those of their abusers who are subject to the jurisdiction of U.S. courts. As the Second Circuit concluded in its landmark *Filártiga v. Peña-Izala*, 630 F.2d 876, 890 (2d Cir. 1980) case: "Our holding today,

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Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law: Note by the High Commissioner for Human Rights, Appendix I: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of [Gross] Violations of International Human Rights Law and [Serious] Violations of International Humanitarian Law (Rev. 24 Oct., 2003), art. 2, at 19, and art. 13, at 22, U.N. Doc. E/CN.4/2004/57 (2004).

giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence." *Filártiga*, 630 F.2d at 890. By the same token, the abandonment of the ATCA would constitute a giant step backward from the realization of this ageless dream and run counter to Congressional intent to promote accountability.

When Congress adopted the Torture Victim Protection Act (affording a private right of action for aliens and U.S. citizens tortured or summarily executed by an individual acting under actual or apparent authority or color of law of any foreign nation), it explicitly retained the ATCA as an avenue for redress for a *broader range* of violations:

> [TVPA] claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by [ATCA] section 1350. Consequently, that statute should *remain intact* to permit suits based on other norms that *already exist or may ripen in the future* into rules of customary international law.

Torture Victim Protection Act [hereinafter TVPA] of 1991, H.R. Rep. No. 102-367(I), at 85 (1991) (emphasis added) [hereinafter House Report]. The Restatement (Third) of Foreign Relations Law recognizes several violations of customary international human rights law not specifically included in the TVPA including genocide, slavery, disappearance, and crimes against humanity. Restatement (Third) of Foreign Relations § 702 (1986).[3] Several ATCA

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[3] Customary international law norms have been construed narrowly by U.S. courts to cover only "well-established, universally recognized norms of international law." *Filártiga v. Peña-Irala*, 630 F.2d 876, 881, 888 (2d Cir. 1980); *accord Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 154 (2d Cir. 2003); *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

plaintiff *amici* successfully have held their perpetrators accountable under the statute for these customary international law violations, which they would not have been able to do under prevailing interpretations of the TVPA. The ATCA therefore plays a continuing and vital role in U.S. leadership in promoting justice for gross human rights abuses and in enabling the United States to fulfill its obligations under international human rights law.

II. ATCA Plaintiffs Would Be Foreclosed from Seeking Justice for Customary Law Violations if the Court Determines that the ATCA Does Not Create a Private Right of Action.

To illustrate the ATCA's impact and importance, we provide the following examples of *amici* survivors who have secured relief under the statute. These survivors suffered injury and loss during prolonged campaigns of widespread terror. Many of the abuses they endured violate several fundamental norms of treaty and customary international law, and violation of one norm may facilitate violation of another. For example, *amici* include family members of victims who were extra-judicially killed after being tortured, some of whom were victims of widespread campaigns later found to be crimes against humanity. Other *amici* have survived torture, often committed in *incommunicado* conditions fostered by arbitrary detention. One *amica* was a plaintiff in an ATCA suit in which torture was a constituent act of genocide because it was carried out as part of a plan to obliterate the Bosnian Muslim population.

The following accounts of *amici*, ATCA plaintiffs, depict the array and brutality of human rights violations addressed by the ATCA, many of which would be without remedy if this court were to determine that the statute does not provide a private right of action.

A. Torture: Dolly Filártiga.

In 1976, Dr. Joel Filártiga operated a clinic for poor country people in Paraguay and was a leading opponent of President Alfredo Stroessner, who had held the country in the grip of a brutal dictatorship since 1954. *Filártiga*, 630 F.2d at 878. He and his family, including his 17-year-old son Joelito and his 20-year-old daughter Dolly, lived near Americo Norberto Peña-Irala, the Inspector General of Police of Asuncion, the capital of Paraguay. *Id.*

On March 29, 1976, Joelito was kidnapped by Peña and others and brought to a police station downtown where he was subjected to electric shocks and other forms of torture, resulting in his death. *Id.* His body was then brought to Peña's home, to which Dolly was summoned to view her brother's remains. *Id.* When Dr. Filártiga subsequently brought a criminal action in Paraguay against Peña for the murder of his son, his lawyer was arrested, "shackled to a wall" and eventually disbarred. *Id.*

Amica Dolly Filártiga arrived in the United States in 1978. On April 6, 1979, she and her father sued Peña, who was living in Brooklyn, New York, in the Eastern District of New York under the ATCA. Initially dismissed, on appeal the Second Circuit held that courts must interpret international law not as it was in 1789, when the statute was enacted, but as it is today; that the law of nations forms part of the law of the United States; and that where the nations of the world have demonstrated that when a particular wrong is "of mutual, and not merely several, concern" that wrong becomes an international law violation within the meaning of the ATCA. *Id.* at 884, 888. The district court awarded the family damages of over $10 million. *Filártiga v. Peña-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

Amica Filártiga became a U.S. citizen and now lives in New York with her husband Diego and her daughter Paloma. She will never forget the March night of 1976 when they dragged her to Peña's house to see her brother's mutilated body. Although she has yet to collect any of the

damages award, she is grateful that justice was done and proud that her name has gone down as marking a giant step forward in the annals of international human rights law. "There's no amount of money that can be put on the price of pain," she remarked. To *amica* Filártiga "[t]he suit is important only as a victory for [the] people of the world." Beverly Beyette, *A 6-Year Quest for Justice*, L.A. Times, Apr. 28, 1982, at 6.

B. Disappearance: Zenaida Velásquez.

Amica Zenaida Velásquez is the sister of Manfredo Velásquez Rodriguez, who was abducted and "disappeared" – taken into custody by state agents who subsequently denied knowledge of his whereabouts – by Honduran security forces in September 1981.[4] He was never seen again. Manfredo was a graduate student and political activist opposed to the existing regime. *Amica* Velásquez sought justice from the Inter-American Commission on Human Rights. In a groundbreaking judgment, the Inter-American Court of Human Rights recognized forced disappearance as a grave human rights violation for which Honduras was liable, and ordered the state to compensate the family. *See* Velásquez Rodríguez Case, Inter-Am. Ct. H.R., OAS/Ser.L/V/III.21, doc. 14 (1989) at 123.

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[4] According to the Working Group on Enforced and Involuntary Disappearances (a U.N. mechanism created in 1980), forced disappearance consists of at least the following elements: "(a) Deprivation of liberty in whatever form; (b) Refusal to acknowledge the deprivation of liberty by the authorities; (c) Removal of the disappeared person from the protection of the law." Commission on Human Rights, *Inter-sessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, First Session, 6-17 January, 2003, Geneva, at http://www.unhchr.ch/huridocda/huridoca.nsf/0/04238ca85b0302b9c1256caf0055a5cf?Open Document.

Despite the legal importance of the case, the outcome fell far short of justice. "[T]he Government never admitted culpability, no one was ever punished, and the culture of impunity in Honduras was not changed," she noted. Zenaida Velásquez, Statement, *at* http://www.cja.org/forSurvivors/zenaida%20for%20survivors.shtml. Determined to pursue her claim, *amica* Velásquez, who had fled to the U.S. following threats to her own life, turned to the courts of her new home. On July 12, 2002 *amica* Velásquez, a U.S. citizen since 1997, and five other plaintiffs filed an ATCA claim against Juan López Grijalba, the former head of Honduran military intelligence for violations of international law, including torture, disappearances, and extrajudicial killings. Compl. ¶¶ 46-49, *Reyes v. Grijalba* (No. 02-22046). The complaint alleges that Colonel Grijalba is liable by virtue of command responsibility while in control of Battalion 3-16 and a secret death squad unit "operating in coordination with the Battalion or under its control" in the early 1980s. *Id.* ¶¶ 12, 88. Grijalba had been living in the United States since 1998, when he was granted Temporary Protected Status as a result of Hurricane Mitch. He was arrested by the immigration service in 2002, and witnesses and evidence discovered in the course of the ATCA lawsuit have proved instrumental in the deportation case.

Amica Velásquez observed:

> This case ... will enable us to hold a high-ranking official responsible and thereby begin to pierce the culture of impunity. ... If we win our case, and if López Grijalba is deported, that will have a tremendous impact in Honduras ... we can break the impunity that criminals like Colonel López Grijalba have enjoyed and realize the dream [of justice] shared by the families of the disappeared and tortured people everywhere.

Velásquez, Statement, *supra*.

C. Crimes Against Humanity: Zita Cabello-Barrueto.

Following the September 1973 coup in Chile, led by General Augusto Pinochet, military authorities arrested Winston Cabello, the brother of *amica* Zita Cabello-Barrueto. Winston Cabello worked as regional planning director for the Atacama-Coquimbo region in northern Chile under the government of President Salvador Allende. Winston Cabello was detained in a garrison in the northern town of Copiapó. Approximately one month after his arrest, Winston was killed by a secret military squad, which came to be known as "*La Caravana del Muerte*" or the "Caravan of Death," of which Fernández Larios was a member.[5] The Caravan of Death, a roving military death squad organized by Chilean dictator Augusto Pinochet, killed more than 70 civilians associated with the administration of the fallen Allende government. *See* Hugh O'Shaughnessy, *Pinochet: The Politics of Torture* 63 (2000).

In early 1974, *amica* Cabello-Barrueto and her husband were able to leave Chile and came to the United States where they obtained asylum and, eventually, U.S. citizenship. Ms. Cabello-Barrueto and her family yearned for justice for Winston's brutal murder, a quest they pursued for thirty years.

In 1998, *amica* Cabello-Barrueto discovered that Armando Fernández Larios was living in Florida. In 1999, the family filed an ATCA suit against Fernández Larios. *Estate of Cabello v. Fernández-Larios*, 205 F. Supp. 2d 1325, 1327-28 (S.D. Fla. 2002). Through the legal process

[5] Fernández-Larios was an officer-member of the Death Squad. Elizabeth Manning, *Humanity, Hope Amid Rights Statistics*, United Press Int'l, May 28, 2003. He later joined DINA ("*Direccion de Intelligencia Nacional*" or "Directorate of National Intelligence"), "Chile's feared secret police" as a major. David Adams, *27 Years Later, Chile's Caravan of Death Touches U.S.*, St. Petersburg Times, Mar. 13, 2000.

amica Cabello-Barrrueto overcame the sense of powerlessness and injustice she had felt:

> I want to honor the men and women who have had the moral courage to challenge the inevitability of injustice; to all of those who have come to the realization that peace based on accommodation rather than on accountability necessarily leads to the repetition of past tragedies; to those who have chosen to work in favor of human dignity, peace, solidarity and justice.

Zita Cabello-Barrueto, Statement, *at* http://www.cja.org/forSurvivors/ZitaforSurvivors.shtml.

On October 15, 2003, a federal jury found Fernández Larios liable for, *inter alia*, crimes against humanity for his role in Winston Cabello's murder. This was the first contested trial in the United States in which a jury awarded damages to a plaintiff for crimes against humanity.[6] Jason Dearen, *Woman's Painful Journey To Find Brother's Killer*, Oakland Tribune, Oct. 28, 2003.

D. Genocide: Alma Vilogorac.

Amica Alma Vilogorac (Jane Doe XI) is a Bosnian woman who resided in Sarajevo and its surrounding areas

[6] One modern definition of crimes against humanity may be found in the Statute of the International Criminal Tribunal for the Former Yugoslavia, article 5, which gives the tribunal jurisdiction over "the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts." Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).

in Bosnia-Herzegovina during 1992-1993. Consolidated Compl. ¶ 15, *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994), *rev'd sub nom. Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (No. 93-878).

This was the period in which the city was besieged by Bosnian-Serb Forces. *Id.* The self-proclaimed leader of the Bosnian Serbs, Radovan Karadzic, declared that his goal was to destroy Sarajevo. John F. Burns, *Shelling By Serbs Pounds Sarajevo*, N.Y. Times, Aug. 1, 1992, at 1 (Karadzic announced that his goal was to "put the Muslims through the meat grinder" in Sarajevo.). *Amica* Vilogorac, along with her husband and infant son, suffered grenade attacks, sniper fire, and the deprivation of food and water. Consolidated Compl. ¶ 15, *supra*. "The level of bombing and terror and destruction was unimaginable." Aff. Jane Doe XI ¶ 9, *Karadzic*, 866 F. Supp. 734. "I witnessed the mass killings of people in bread and water lines. I stood on many of these lines, only to seconds later see arms, legs, flesh and blood flying all about. Neighbors, friends, acquaintances died from snipers, bombs, and burnings." *Id.* ¶ 12. Later, *amica* Vilogorac learned that her two brothers had "disappeared," and in November 1999, she was told that the bodies likely were buried in a mass grave. *Id.* ¶ 19.

In 1993, *amica* Vilogorac and twenty-one other plaintiffs filed an ATCA suit against Radovan Karadzic claiming, *inter alia*, that the defendant was liable for genocide against the Bosnian Muslim population. *Karadzic*, 866 F. Supp. at 736.[7] In 2000, a jury awarded the plaintiffs over $4.5 billion in damages. Pete Bowles & Patricia Hurtado,

[7] Plaintiffs alleged that "they are victims, and representatives of victims, of various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian civil war." *Karadzic*, 70 F.3d at 236-37.

Karadzic Ordered To Pay $4.5 Billion, Newsday (Nassau Ed.), Sept. 26, 2000.

Amica Vilogorac remembers not only the gruesome facts of life during the war but also the sense of helplessness, the grotesque reality: "I lived there as if in a concentration camp; I could not leave and yet I could not stay. I stopped fearing death, surrounded as I was by death every single day. Indeed, I longed for death for what I experienced in Sarajevo cannot be described as life." Aff. Jane Doe XI ¶ 17, *supra*.

III. The ATCA Promotes Healing for Individuals and Their Communities, as Well as Justice.

Through the ATCA, U.S. federal courts promote justice for survivors of the most serious violations of treaty and customary international law. *Amici curiae* seek to underscore the effects of the pursuit of justice through the ATCA on survivors of atrocities and their communities.

A. ATCA Trials Help to Break the Silence for Individual Plaintiffs.

Perpetrators of genocide, crimes against humanity, disappearances, and other atrocious violations of international human rights and humanitarian law frequently deny the fact of or their complicity in the horrors. In the face of official accounts that flatly contradict the truth and falsely portray victims as wrongdoers, survivors bury their loss in silence. For example, officials disseminated a false story that Winston Cabello was one of thirteen political prisoners killed while trying to escape. *Fernández Larios*, 205 F. Supp. 2d at 1327. Enormously disturbed by the unacknowledged truth of her brother's killing, *amica* Cabello-Barrueto never shared it with her family. Zita Cabello-Barrueto, *Fighting Impunity in Chile: A Bay Area Family's Legal Victory*, World Affairs Council of Northern California (Feb. 5, 2004), *at* http:// wacsf.vportal.net (audio archive, at 13:34) [hereinafter *Fighting Impunity*]. The

ATCA provides a mechanism for survivors to break the silence surrounding the abuses they or their family members have experienced, by testifying in a judicial forum.

Psychologists have documented the effects of trauma on survivors of gross human rights violations. D. Silove et al., *The Psychological Effects of Torture, Mass Human Rights Violations, and Refugee Trauma: Toward an Integrated Conceptual Framework*, 187 J. of Nervous and Mental Disease 200 (1999); Guus Van Der Veer, *Psychotherapeutic Work with Refugees, in Beyond Trauma: Cultural and Societal Dynamics* 151 (Rolf J. Kleber et al., eds., 1995). The violent nature of the abuses disrupts survivors' relationships to the world by stripping them of their autonomy and sense of control. Elizabeth Lira Kornfeld, *The Development of Treatment Approaches for Victims of Human Rights Violations in Chile, in Beyond Trauma, supra*, 116-17. Research indicates that disclosure and establishment of the truth behind the occurrence of grave human rights violations are important features of survivors' recovery. Mental health professionals avow that the "conspiracy of silence" – the absence of public discussion about abuses – which frequently surrounds gross human rights violations is detrimental to the recovery of survivors by intensifying their already profound sense of isolation and mistrust of society. Judith Herman, *Trauma and Recovery: The Aftermath of Violence From Domestic Abuse to Political Terror* 9, 93 (1997); *see, e.g.*, Yael Danieli, *Preliminary Reflections from a Psychological Perspective, in Transitional Justice: How Emerging Democracies Reckon with Former Regimes* 572 (Neil J. Kritz ed., 1995).

Truth, as a premise of redress for survivors, should be understood to entail not only knowledge, but also acknowledgment; that is, "the determination of facts about the past, and a full, public, and official acknowledgement thereof." Michelle Parlevliet, *Considering Truth: Dealing with a Legacy of Gross Human Rights Violations*, 16 Netherlands Quarterly of Human Rights 143, 145 (1998).

Amicus Juan Romagoza, characterized his experience of breaking the silence at trial as a vehicle for healing and justice:

> The most important thing is to speak out and not let yourself be dominated by silence. But it's not just speaking and opening wounds. . . . We need to find spaces that can generate mechanisms or channels for justice, and not just put these people in jail but prevent this kind of activity from happening again, and isolate torturers who come to the United States in search of a paradise.

Juan Romagoza, Statement, *at* http://www.cja.org/forSurvivors/JuanforSurvivors.shtml.

B. ATCA Trials Enable Survivors to Seek Dignity and Justice on behalf of their Loved Ones and their Broader Communities.

ATCA plaintiff *amici curiae* understand their role as seeking justice not simply in their individual capacity, but also as acting on behalf of loved ones and all those who were killed or otherwise brutalized and who have been unable to find their day in court.

Clinicians have noted that survivors pursuing legal action against their perpetrators may find meaning in their experience, a response Professor of Psychiatry Judith Herman has labeled a "survivor mission." Herman, *supra* at 207-11. Similarly, one study of war crimes survivors who appeared before the International Criminal Tribunal for the Former Yugoslavia found that testifying about the events enabled them to discharge the "moral debt" they felt to those who had been killed to tell the story of how they perished. Eric Stover, Human Rights Center, University of California, Berkeley, *The Witnesses: War Crimes and the Promise of Justice in the Hague* 65, 127 (2003).

Amicus Carlos Mauricio felt he testified both for himself and also for those who could not:

> To close the seal of my healing, I needed to talk in front of a jury and tell them my story. . . . How many were able to confront the generals? Very few. They couldn't because they were killed under torture, or they didn't want to. . . . [I]n a way, I was the spokesperson for those who for whatever reason, couldn't come.

Rona Marech, *A Survivor's Victory Salvadoran Torturers Are Found Guilty,* S. F. Chron., Aug. 19, 2002, at B1.

Thus the ATCA enables survivors to pursue justice and find a moral purpose in so doing. The legal process transforms individual loss into social capital. As captured by *amica* Cabello-Barrueto: "[Winston Cabello's] senseless death can only have meaning if those who survived learn how to prevent these atrocities from happening all over again." Cabello-Barrueto, Statement, *supra*.

A victory for a single ATCA plaintiff can lead to a sense of victory for his or her community. *Amica* Cabello-Barrueto returned to Chile after the trial where she discovered: "the feeling . . . of everyone who lived in Chile [that] no member of the Caravan of Death would ever be prosecuted in Chile. So people approached me and said Winston spoke for everybody, for all those who could no longer speak." *Fighting Impunity*, *supra*, at 32:50.[8] The ATCA victory of *amici* Mauricio, Romagoza and Gonzalez against two former Salvadoran generals similarly reverberated in the survivors' home country. Maria Julia Hernandez, director of the Human Rights Office of the Archdiocese of El Salvador stated:

[8] Reacting to the verdict against Fernández Larios, the widow of Winston Cabello commented: "Dignity has been recovered. We share this with all of the family members, all of the families of victims that are in Chile." *Jury Order Ex-Officer to Pay Restitution*, S. F. Chron., Oct. 15, 2003.

> The process and the verdict in this case are accomplishments in a long and most difficult fight against impunity. It is a case in which all the victims of El Salvador . . . emerged and were represented by these brothers and this sister. Such administration of justice is what we have always hoped to realize. Now each of us has been touched in a way that inspires us to continue on this road.

Sandra Coliver, *Human Rights Accountability: Impact of Tort Cases Against Individual Perpetrators, at* http://www.alternet.org/story.html?StoryID=17151 (quoting Maria Hernandez).

C. The ATCA Provides Judicial Acknowledgement of and Accountability for the Harm Suffered by Survivors.

The authoritative record of events created during an ATCA trial serves as a public acknowledgment of harms endured by survivors. This affords survivors a measure of what legal scholar Martha Minow has called "the key of formal justice." Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* 26 (1998). Mental health professionals have noted positive aspects to formal justice. Psychologists have found that official acknowledgment of the truth of the survivors' stories counters the past denials or distorted versions of events and helps to end the "political violence" inflicted on them. *See* Nora Sveaass & Nils Johan Lavik, *Psychological Aspects of Human Rights Violations: The Importance of Justice & Reconciliation*, 69 Nordic J. of Int'l L. 35, 49 (2000); *see also*, Danieli, *supra,* at 572. A court judgment that the survivor's suffering merits reparation "is also a definition of the survivor as a worthy or deserving victim." Naomi Roht-Arriaza, *Punishment, Redress, and Pardon: Theoretical and Psychological Approaches, in Impunity and Human Rights in International Law and Practice* 19 (Naomi Roht-Arriaza ed., 1995).

Trial judgments provide a "direct, moral, and ethical response to victims on behalf of society that demonstrates the state is validating their innocence and their lack of culpability in the deeds." Laurel E. Fletcher & Harvey Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 Human Rights Quarterly 573, 590 (2002). *Amica* Demissie's ATCA case against Ethiopian "Red Terror" torturer Kelbessa Negewo fostered community acknowledgment of his heinous acts. Woubishet Tedla, of the Ethiopian Community Association in Atlanta commented on the impact of *amica* Demissie's suit: "[I]t is pretty much accepted that this man did the things these women say he did, and most in the community pretty much avoid him. Many people praise these women for going out of their way and making the sacrifices they did to bring this suit." Ronald Smothers, *Nightmare of Torture in Ethiopia Is Relived in an Atlanta Court*, N.Y. Times, May 22, 1993, at 6.

The impartiality, solemnity, and formal procedures of U.S. courts provide ATCA plaintiffs a respectful forum to adjudicate their allegations. American judicial procedures respond to the need of many survivors for a considered decision regarding their substantive claims. One study concluded that individuals are sensitive to the process and procedures they experience as litigants. E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 Law & Soc'y Rev. 957-58 (1990). More important than the outcome of the case, the perceptions of litigants about the judicial process predominantly are determined by the respect and dignified treatment they are accorded, the perceived control over the case outcome and the litigation process, and the symbolic features of the procedures. *Id.* *Amicus* Romagoza observed that the lawsuit "first gave me the hope I needed in order to believe in justice, to believe that justice can come, particularly in this country, my new country, the USA." Romagoza, Statement, *supra*.

ATCA plaintiffs and those who work closely with them substantiate these findings. As noted above, most plaintiffs are motivated by the opportunity to confront their persecutors in court, to expose their crimes, and to divest them of their undeserved dignity. Beth Stephens & Michael Ratner, *International Human Rights Litigation in U.S. Courts* 234 (1996). One co-plaintiff of *amica* Demissie described confronting her abuser in court as follows: "It felt good. . . . Before I was tied up and hanging upside down. But this time I am standing up and facing him. I don't have to be afraid of him. . . . Maybe finally he will have to pay for making so many lives miserable." Smothers, *supra*.

In addition to public acknowledgment, the award of damages constitutes judicial recognition of the pain and suffering of survivors and the responsibility of defendants for causing the injuries.[9] A central purpose of punitive damages in U.S. civil litigation is to punish the wrongdoer for "outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts §908 (2003).[10] Given the

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[9] "[T]he plaintiffs in [ATCA] cases . . . take tremendous satisfaction from filing a lawsuit, forcing the defendant to answer in court or to abandon the United States, and creating an official record of the human rights abuses inflicted on them or their families." Beth Stephens & Michael Ratner, *International Human Rights Litigation in U.S. Courts* 234 (1996). One legal scholar has described accountability in ATCA litigation as consisting of multiple components: (1) compensation; (2) denial of a safe haven to the defendant; (3) deterrence of similar conduct; and (4) "the enunciation of legal norms opposing the conduct for which the defendant has been found liable." Harold H. Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2349 n.11 (1991).

[10] As the court in an ATCA case against a Rwandan perpetrator noted: "One can not place a dollar value on the lives lost as the result of the defendant's actions and the suffering inflicted on the innocent victims of his cruel campaign. Unfortunately, however, a monetary judgment is all the Court can award these plaintiffs." *Mushikiwabo v. Barayagwiza*, 1996 U.S. Dist. LEXIS 4409, at *6 (S.D.N.Y. Apr. 9, 1996).

serious violations adjudicated under the ATCA, judges and juries have awarded punitive damages in all successful judgments under the statute. *Abebe-Jira v. Negewo*, 72 F.3d 844, 846 (11th Cir. 1996); *Karadzic*, 70 F.3d 232; *Estate of Cabello v. Fernández-Larios*, No. 99 Civ. 0528 (S.D. Fla. Oct. 31, 2003); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1360 (N.D. Ga. 2002); *Romagoza, Gonzalez & Mauricio v. Garcia*, No. 99-8364 (S.D. Fla. Jul. 31, 2002); *Mushikiwabo v. Barayagwiza*, 1996 U.S. Dist. LEXIS 4409, at *6 (S.D.N.Y. Apr. 9, 1996); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass 1995); *In re Estate of Marcos Litigation*, D.C. No. MDL 840 (D. Haw. Feb. 3, 1995); *Paul v. Avril*, 901 F. Supp. 330, 336 (S.D. Fla. 1994); *Todd v. Panjaitan*, 1994 WL 827111 (D. Mass. 1994); *Forti v. Suarez-Mason*, No. C-87-2058-DLJ (N.D. Cal. Apr. 25, 1990); *Martinez-Baca v. Suarez-Mason*, No. C-87-2057 SC (N.D. Cal. Apr. 22, 1988); *Filártiga*, 577 F. Supp. 869.

IV. The ATCA Should Be Preserved Because It Provides a Remedy for Mass Atrocities, War Crimes, Slavery, and Other Human Rights Violations Not Covered by the TVPA.

As noted previously, Congress clearly intended the ATCA to augment the remedies created by the TVPA. *Supra*, Section I. In particular, the ATCA is critical to survivors of widespread, mass, and systematic abuses, because it allows adjudication of claims such as crimes against humanity, war crimes, and genocide. Restatement of Foreign Relations, *supra*, § 702; *see also Fernández Larios*, 205 F. Supp. 2d at 1331; *Kadic v. Karadzic*, 70 F.3d at 242. Similarly the ATCA provides a remedy for serious violations of individual human rights that are excluded from current interpretation of the TVPA. *Supra*, Section II.

A. Mass Violations Are Not Covered by the TVPA.

It is especially important for survivors of situations in which thousands of people were affected to achieve recognition of these collective crimes in their trials in order to promote social reintegration. *See, e.g.*, Diana Kordon et al., *Argentina: Psychosocial and Clinical Consequences of Political Repression and Impunity*, 8 Quarterly J. on Rehabilitation of Torture Victims & Prevention of Torture, 43, 44 (1998). While claims under the TVPA recognize individual acts of torture and extrajudicial killing, where these violations occur as part of a campaign or policy, survivors are unable to obtain legal acknowledgment of the collective dimension of their suffering.

B. Important Individual Violations Are Not Covered by the TVPA.

The jurisdictional limitation of the TVPA is a concern not only for mass acts like genocide and crimes against humanity, but also for grave individual violations such as arbitrary detention and slavery (suffered by *amici* John Roe VIII, John Doe V and John Doe XI). Egregious human rights abuses frequently occur in conjunction with each other – *amica* Velásquez' brother, Manfredo, was arbitrarily detained, disappeared, and executed. *Reyes* Compl. ¶¶ 87-88, *supra*. To provide a cause of action for merely one act in a course of conduct by the perpetrators fails to allow the survivors to confront the entirety of their experience in trial, and furthermore fails to adjudicate the entirety of their claims. As Professor Minow points out, the process of remembering and acknowledging these atrocities requires assembling all of the distinct aspects of the abuse. Minow, *supra*, at 120.

For example, some *amici curiae* survivors were tortured during the course of their arbitrary detention; however, only the torture violation is currently recognized under the TVPA. *Amicus* Mauricio was arbitrarily

detained by authorities. Second Am. Compl. ¶ 38, *Romagoza, Gonzalez & Mauricio v. Garcia*, No. 99-8364 (S.D. Fla. July 31, 2002). He was held at a "clandestine torture center at the National Police headquarters as a suspected Farabundo Marti National Liberation Front (FMLN) '*comandante*' (commander)." *Id.* ¶ 38. Initially, he was given no food or drink. *Id.* ¶ 39. Later, *amicus* Mauricio was forced to stand for hours while in detention. *Id.* Failure at this exercise resulted in additional torture. *Id.*

Amicus Romagoza also was held in arbitrary detention. *Romagoza* Compl. ¶ 18, *supra*. He "was blindfolded and taken by helicopter to a local army garrison." *Id.* ¶ 15. "During the flight, soldiers pushed [Romagoza] to the edge of the open door of the helicopter and threatened to throw him out. Upon his arrival at the garrison, [Romagoza] was stripped of his clothes, bound spread eagle to a table, interrogated and beaten." *Id.* The TVPA allows the adjudication solely of survivors' claims of torture and fails to provide an acknowledgement or a remedy for their arbitrary detention which clearly forms an integral component of the violations for which they seek justice.

Claims adjudicated solely under the TVPA risk exclusion of important abuses which form part of more widespread, systematic human rights abuses as well as those which are serious violations of customary international law – slavery, arbitrary detention, disappearances – yet not enumerated in the TVPA. Congress clearly found it unnecessary to include these violations in the TVPA given that the ATCA already covered these abuses. Consistent with Congressional intent, the ATCA enables civil prosecution of survivors' claims that permits broad legal acknowledgement of their victimization.

V. Severely Narrowing the Judicial Interpretation of the ATCA Would Limit the Ability of U.S. Courts to Contribute to the International Effort to Promote Accountability for Grave Violations of Customary International Law.

A. ATCA Litigation Helps Rid the U.S. of Human Rights Violators.

"In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest." *Filártiga*, 577 F. Supp. at 890. The ATCA has been an important asset for the U.S. government to locate and identify known violators of human rights. Currently, U.S. immigration laws have the unintended effect of allowing war criminals and human rights abusers to enter and remain in the United States. Senate Report on the Anti-Atrocity Alien Deportation Act (107 Cong., 2d Sess. April 25, 2002), SR 107-155, to accompany S.864, Section IV.[11]

The U.S. Bureau of Immigration and Customs Enforcement ("ICE") is taking steps to track down these perpetrators. ICE reported that, as of January 2004, it had opened files on more than 200 suspected human rights abusers. Press Release, ICE, ICE Arrests Ghanaian Human Rights Violator (Jan. 28, 2004).[12] ICE officials recognize that many of these abusers pose a national

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[11] As stated by the Senate Report in support of legislation to close several legal loopholes: "Through these legal loopholes, the United States has become a safe haven for those who exercised power in foreign countries to terrorize, rape, murder and torture innocent civilians. The problem is more than a set of isolated incidents." Senate Report on the Anti-Atrocity Alien Deportation Act (107 Cong., 2d Sess. April 25, 2002), SR 107-155, to accompany S.864, Section IV.

[12] *See also* A. Chardy, *Two Haitian Torture Suspects Held in S. Florida Pending Deportation*, Miami Herald, Dec. 20, 2003.

security threat. Michael T. Dougherty, ICE Operations Director, stated that the September 11, 2001 attacks prompted a close look at the issue of human rights abusers because there is "a nexus, in some cases, between the persecutors and ongoing risks to national security." M. Valbrun, *U.S. to Pursue Torturers Who Flee Here*, Wall St. Journal, May 8, 2003, at A4.

ATCA cases have provided a great boost to immigration service efforts in identifying high level and serious human rights abusers. ATCA cases that have brought crucial new evidence of abusers to the immigration service's attention include the following:

- Kelbessa Negewo was a former senior government official in the Ethiopian military dictatorship that, in the 1970s, launched what came to be known as the Red Terror. He later came to the U.S. and eventually got a job at the same hotel in Atlanta where one of his torture victims also worked. She, together with *amica* Demissie and another survivor, brought an ATCA case against him. A U.S. court determined that Negewo had indeed engaged in numerous acts of torture and other human rights abuses against them. The court's award of compensatory and punitive damages in the amount of $1.5 million to the plaintiffs was subsequently affirmed by an appellate court. *See Negewo*, 72 F.3d 844. The victims' lawyers submitted the trial record to the immigration service and urged that Negewo be deported. Because of the lawyers' protests, Negewo is now facing a denaturalization proceeding.
- Alvaro Rafael Saravia, a captain in the Salvadoran military, was named in numerous credible reports – including the U.N. Truth Commission Report – as having been actively involved in planning and carrying out the 1980 assassination of revered Archbishop Oscar Romero. Indeed, he was detained in a U.S. prison for fourteen months based on a warrant for his extradition from a lower court in El Salvador. When El Salvador's then highly politicized Supreme Court quashed the warrant in 1987, Saravia was released

from prison and has remained in the U.S. As a result of an ATCA case brought against him with the assistance of *amicus* Center for Justice and Accountability ("CJA"), the immigration service once again is investigating him.

- Nikola Vuckovic, a Bosnian Serb, entered the United States as a refugee in 1996. *Amicus* Kemal Mehinovic, assisted by *amicus* CJA, filed an ATCA case against him in 1998, and urged the immigration service to deport him. The service, however, was unable to obtain sufficient evidence to commence deportation proceedings. In 2002, a federal judge found Vuckovic liable for crimes against humanity, including the torture of four Bosnian Muslim plaintiffs. As a result of the lawsuit, Vuckovic fled the country. Bill Rankin, *U.S. Judge in Atlanta Awards $140 Million to Men Who Claimed Torture in Bosnia*, Atlanta Journal-Constitution, Apr. 30, 2002, *at* http://www.cja.org/cases/Mehinovic_News/Atlanta%20Journal%204%2030%2002.htm.
- Col. Carl Dorelien, a member of Haiti's High Command, was arrested by the immigration service and, in January 2001, deported back to Haiti for his command responsibility for a massacre of more than 100 civilians committed in April 1994. However, in 1997, Dorelien had won $3.2 million in the Florida State Lottery. The immigration service could do nothing to block his access to those assets. It is only because of an ATCA suit, filed with the assistance of *amicus* CJA that his victims are able to prevent him from keeping that money. A. Chardy, *Ex-Haitian Colonel Sued to Pay Massacre Victim's Family*, Miami Herald, Jan. 26, 2003.

These cases are by no means exceptional.

ATCA lawsuits provide a valuable complement to the government's efforts. Of the eighteen defendants successfully sued under the ATCA, ten left the country and one

was deported, all seemingly in response to the lawsuits. Coliver, *supra*.[13] Moreover, there is anecdotal evidence that the lawsuits are deterring violators from coming to the United States who might otherwise do so.[14] The lawsuits

[13] Following are the names of individual defendants who have been found liable under the ATCA, their nationality, and whether and under what circumstances they left the United States after the trial: Peña-Irala, *Filártiga*, 630 F.2d 876 (Paraguayan, deported); Suarez-Mason, *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) (Argentinean, extradited); ex-President Marcos, *Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986) (Filipino, died); Imee Marcos-Manotoc, *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (Filipina, voluntarily departed); Barayagwiza, *Barayagwiza*, U.S. Dist. LEXIS 4409 (Rwandan, voluntarily departed); Panjaitan, *Todd v. Panjaitan*, 1994 WL 827111 (D. Mass. 1994) (Indonesian, voluntarily departed); Negewo, *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (Ethiopian, remained); Avril, *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994) (Haitian, voluntarily departed); Vukovic, *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (Bosnian Serb, no longer living openly in United States, presumed to have departed or living underground); Garcia, *Estate of Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) (Salvadoran, remains); Casanova, *Romagoza, Gonzalez & Mauricio v. Garcia*, No. 99-8364 (S.D. Fla. July 31, 2002) (Salvadoran, remains); Fernández Larios, *Cabello Barrueto v. Fernández Larios*, 291 F. Supp. 2d 1360 (S.D. Fla. 2003) (Chilean, remains); Sosa, *Alvarez-Machain v. U.S.*, 331 F.3d 604 (9th Cir. 2003) (Mexican, remains in the witness protection program). Five defendants were successfully sued who were on visits to the U.S., all of whom left shortly after the lawsuit was filed: Karadzic, *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994) (Bosnian Serb); Lumintang, *Doe v. Lumintang*, Civ. No. 00-674 (D.D.C. Sept. 10, 2001) (Indonesian); Gramajo, *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (Guatemalan), Kavlin, *Kodak v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997) (Bolivian); Assasie-Gyimah, *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996) (Ghanaian).

[14] General Emilio Ponce, Salvadoran former Minister of Defense (1990-93) and the President of a newly formed Association of Veterans of El Salvador which supports the right-wing ARENA party, complained that "he and his partners are suffering persecution for the work they did." He criticized the recent lawsuits in the United States against former ministers Guillermo Garcia and Eugenio Vides Casanova for human rights violations and said that these cases make it harder for

(Continued on following page)

are likely to have more of a deterrent impact than the deportations given that the lawsuits receive more publicity in the defendants' home countries, in part because the defendants in the civil suits tend to be high level offenders and because the civil trials are open to the public whereas the deportation proceedings are generally closed. "We have sent a loud message," said *amicus* Mauricio, "torture is not permitted and there's no impunity anymore ... [the perpetrators] will always have to be wary that someone may recognize them and bring them to justice." Robert Collier, *Florida Jury Convicts Two Salvadoran Generals of Atrocities: $54.6 Million Awarded to Three Torture Victims*, S.F. Chron., July 24, 2002, at A12.

B. ATCA Cases Strengthen the Rule of Law in the Countries from Which the Defendants Came.

Most ATCA plaintiffs are unable to pursue justice in their home countries for a variety of reasons. Amnesty laws may preclude prosecution; lawyers and plaintiffs, and even judges and prosecutors, may be subject to intimidation; and/or the justice system simply may not have the resources or political will to prosecute the cases. *See* Amnesty International, *Torture Worldwide: An Affront to Human Dignity*, 107 (2000) (noting various countries in which evidence is covered up, investigations are ineffective, officers are complicit, and even the definition of international crimes is not in line with international human rights law).

them to visit the United States. *Military Requests to Preserve Amnesty*, La Prensa Grafica (one of El Salvador's leading papers), Feb. 14, 2004, at. 2 (translation by Almudena Bernabeu).

ATCA cases can play a powerful role in mobilizing the necessary political will. The successful ATCA case of *amici curiae* Romagoza, Mauricio, and Gonzalez triggered discussions in El Salvador about the need to hold perpetrators of past crimes accountable. In fact, one member of the Salvadoran Congress has called for the repeal of the 1993 Amnesty law. Coliver, *supra*. The ATCA trial of Fernández Larios received extensive coverage by the Chilean and Argentine press. *See, e.g., Civil Action Brought by Executed Man's Family*, The Santiago Times, Sept. 24, 2003; *El Martes Comienza en Miami el Juicio Contra el Ex Capitan de Ejercito Armando Fernández Larios (On Tuesday the Trial Against the Former Army Captain Fernández Larios Begins in Miami)*, ArgenPress, Sept. 20, 2003.

Legal scholar Elliot Schrage suggests that the existence of the ATCA may be a useful incentive to corporations to support the strengthening of judicial systems in the countries where they operate. He supports a strategy that would "harness the power of private litigation in U.S. courts . . . [to be] a vehicle for encouraging other countries and the corporations that operate in them to promote respect for the rule of law and improve the administration of justice." Elliot Schrage, *Judging Corporate Accountability in the Global Economy*, 42 Columbia J. Transnat'l L. 53, 57 (2003).

VI. The ATCA Is Unlikely to Create a Flood of Litigation.

While the impact of cases on particular survivors and their communities has been immeasurable, the number of cases likely to be filed is very modest. To date, the federal courts have been fully capable of dismissing lawsuits that do not meet the rigorous jurisdictional thresholds of ATCA jurisprudence. As a result, only a few ATCA lawsuits have

been allowed to proceed by the courts; since 1980, judgments have been rendered against only eighteen defendants, including Sosa.[15] Courts have begun to dismiss cases on *forum non conveniens* as well as other grounds. *See Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003).

Even for those individuals who satisfy the procedural requirements, the decision to pursue a civil remedy is a difficult one, and not all victims demand their day in court.[16] "Not many people can go through this sort of thing, to allow yourself to go through just as much pain as when you were tortured. [*Amicus* Romagoza] is the bravest man I know," remarked Dr. Karen Hanscom, a psychologist who attended the Romagoza trial. Joshua Phillips, *The Case Against the Generals*, The Wash. Post Mag., Aug. 17, 2003, at W06.

The modest numbers of successful ATCA cases, however, continue to have an enormous impact on the lives of the litigants, their families, and their home communities. These survivors have been devastated by horrible abuses for which there will never be adequate compensation. The ATCA, however, represents a small seed of justice that has already been planted in their lives and communities. *Amica* Cabello-Barrueto recalls her brother telling her, the last time she saw him alive, in prison: "[The Pinochet

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[15] *See supra*, note 13.

[16] Not only does a trial mean recalling terrible physical and psychological traumas from the past, but many victims do not take actions to formally establish the truth out of a fear of negative consequences to themselves and their families in the home country. *See* Priscilla Haynar, *Unspeakable Truths: Confronting State Terror and Atrocity* 185 (2001); *see also* Richard Knudten et al., *The Victim in the Administration of Criminal Justice: Problems and Perceptions, Criminal Justice and the Victim* 115-146 (William F. McDonald ed., 1976) (discussing the various psychological obstacles to victims confronting a trial).

forces] can cut all the flowers, but they can never prevent the spring from coming back." In reflecting on the meaning of her suit, she commented: "We have the spring back now." *Fighting Impunity*, *supra*, at 52:53.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Respectfully submitted,

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APPENDIX A

Amici Curiae

For ease of identification, *amici curiae* individual ATCA plaintiffs are listed per the ATCA case each filed.

Abebe-Jira v. Negewo

Elizabeth Demissie was the daughter of a prominent Ethiopian judge. In 1977, Kelbessa Negewo, an official in the military government, began targeting her and her family. Negewo had Elizabeth detained several times. During her last imprisonment she was brutally tortured. Her sister, with whom Elizabeth was arrested, was taken from their cell the same night and never heard from or seen again. In 1981, Elizabeth came to the United States. In 1990, Elizabeth and two other women brought an ATCA suit against Negewo in Atlanta, Georgia, where he was living and working, for torture and were awarded $1.5 million in damages.

Romagoza, Gonzalez and Mauricio v. Garcia and Vides Casanova

Juan Romagoza Arce, M.D. worked as a physician and surgeon in El Salvador until 1980, when he was detained and tortured at the National Guard Headquarters. After his release, Dr. Romagoza fled El Salvador. He arrived in the United States in April of 1983 and subsequently was granted political asylum. Because of torture to his arm and hands he has been unable to perform surgery. He now directs a major public health clinic in Washington D.C.

Neris Gonzalez was a catechist in El Salvador in 1979 when she was detained and tortured in a National Guard

Post while being eight months pregnant. Her infant son was born with multiple injuries, broken bones and indentations on his face. He died two months after his birth. Gonzalez fled El Salvador for the United States and was eventually granted political asylum.

Carlos Mauricio was a professor at the University of El Salvador when he was detained in June 1983 and tortured at the National Police Headquarters. Upon being released, Mauricio fled to the United States, where he is now a legal permanent resident. In 1999, he and *amici* Dr. Romagoza and Neris Gonzalez filed an ATCA lawsuit against Generals Garcia and Vides Casanova. In July 2002, a Florida jury found the generals responsible under the doctrine of "command responsibility" for horrific acts of torture perpetrated against the plaintiffs and were ordered to pay $54.6 million to the plaintiffs.

Cabello-Barrueto, et al. v. Fernández Larios

Zita Cabello-Barrueto, Ph.D., was 27 years old when on October 17, 1973, a Chilean military death squad that came to be known as "the Caravan of Death" murdered her brother, Winston Cabello, and twelve other prisoners who had been incarcerated by the Chilean Army. Ms. Cabello-Barrueto and her husband, who also had been a political prisoner, fled to the United States, where they received political asylum. She earned a Ph.D. in Economics at the University of California in Berkeley and became a college professor. In February 1999, Dr. Cabello-Barrueto and three family members filed a complaint in U.S. District Court in Miami against Armando Fernández Larios, a member of the Caravan, alleging that he directly carried out, or participated in bringing about, Winston's murder.

On October 15, 2003, a jury found Fernández Larios liable for numerous violations including crimes against humanity and awarded her family $ 4 million in damages. This was the first crimes against humanity judgment in a contested case before a U.S. court.

Doe v. Karadzic

Alma Vilogorac (Jane Doe XI) is a Bosniak (Bosnian Muslim) who resided in Sarajevo and its surrounding areas in Bosnia-Herzegovina during the conflict in 1992-1993. During this time the city was besieged by Bosnian-Serb Forces. Alma Vilogorac, along with her husband and infant son, experienced grenade attacks, sniper fire, and the deprivation of food and water. Her brothers were disappeared. In 1993, Alma Vilogorac and twenty-one other plaintiffs filed an ATCA suit against Radovan Karadzic, political leader of the Bosnian Serb forces, for his responsibility for numerous grave violations including genocide. In 2000, a jury awarded the plaintiffs over $4.5 billion in damages.

Filártiga v. Peña-Irala

Dolly Filártiga and her younger brother Joelito lived in Asuncion, Paraguay, in 1976, with her mother and father, a long-time opponent of Paraguay's dictator, General Alfredo Stroessner. That year, her brother was abducted and later tortured to death by Americo Norberto Peña-Irala, the Inspector of Police of Asuncion. Dolly Filártiga was forced out of her house in the middle of the night to view her brother's mutilated body. After her arrival in the United States, she sued Peña under the ATCA in New York, becoming the first plaintiff to successfully use this

two-centuries-old statute to seek justice for human rights violations. In 1984, she and her father were awarded over $10 million in damages.

Mehinovic v. Vuckovic

Kemal Mehinovic is a Bosniak (Bosnian Muslim). In 1992, he was arrested by Serb police in his home and beaten in front of his wife and children. He was taken to a prison where he was brutally tortured and later sent to concentration camps. He was later released and admitted to the United States with his family as refugees in 1995. In 1998 Mr. Mehinovic and three other Bosniaks filed suit under the ATCA against Nikola Vuckovic, one of his torturers. In April 2002, a trial judge found Vuckovic liable for severe acts of physical and mental abuse amounting to crimes against humanity and awarded $35 million to each of the plaintiffs.

Reyes, et al. v. Grijalba

Oscar Reyes is a native of Honduras, and a journalist and communications professional. He holds a master's degree in mass communications from the University of Minnesota. He was the founder and director of the School of Journalism at the National University of Honduras, and served as a communications advisor to the Honduran Minister of Culture, Tourism, and Information.

Gloria Reyes, a native of Nicaragua, moved to Honduras with her husband, *amicus* Oscar Reyes, in 1970 and became a Honduran citizen. In July 1982, the Reyeses were abducted by Honduran Security forces and subjected to electric shock and beatings in a clandestine torture facility. They were released from detention, thereafter

fleeing to the United States and eventually becoming U.S. citizens.

Zenaida Velásquez is the sister of Manfredo Velásquez Rodriguez, who was abducted and disappeared by Honduran security forces on September 12, 1981. In 1988, Ms. Velásquez left Honduras for the U.S., receiving asylum in 1994, and becoming a U.S. citizen in 1997. She filed a case with the Inter-American Commission of Human Rights, which led to the ground breaking decision of the Inter-American Court holding the Government of Honduras liable for the disappearance and death of her brother. As no individual was ever held liable by the Inter-American Court, Ms. Velásquez filed an ATCA claim on July 15, 2002 against Juan López Grijalba, the alleged commander of the death squad that disappeared her brother. *Amici* Oscar and Gloria Reyes are also plaintiffs in the suit, alleging that Grijalba had command responsibility for their torture. Their case is scheduled to go to trial before a jury in Miami in July 2004.

Roe v. Unocal Corporation, Doe v. Unocal Corporation

John Roe VIII was a farmer in Kaleinaung, Burma where security forces for the oil company, Unocal, regularly rounded up John Roe VIII and most of his adult male family members, forcing them to construct an oil pipeline. He was tied up at night to prevent escape and on several occasions severely beaten. In 1996, he fled to Thailand to escape forced labor, where he lives in hiding as an undocumented alien.

John Doe V and **John Doe XI** also are survivors of forced labor performed on the Unocal pipeline project in Burma. John Roe VIII, John Doe V and John Doe XI are

plaintiffs in two related ATCA suits against Unocal Corporation filed in 1996 in U.S. district court in California seeking damages for forced labor and other violations of customary international law. The suits remain pending.

SINALTRAINAL v. Coca-Cola Co.

Jose Domingo Flores is a member of the executive board of a trade union representing employees at Coca Cola's subsidiary bottling plants in Colombia. In 1996, the Chief of Security at one of the plants falsely accused Mr. Flores and two other union leaders of planting a bomb at the site following a five-day strike led by Mr. Flores. The accused were arrested and held in a prison controlled by the paramilitaries and subjected to abuse. Released after the prosecutor dismissed the charges as false, Mr. Flores and his family were economically devastated and traumatized as a result of his months in prison. After exhausting all available options in Colombia, Mr. Flores filed an ATCA complaint against Coca Cola for, *inter alia*, unlawful detention and torture, in the Federal District Court for the Southern District of Florida on July 21, 2001. This case is pending.

The National Consortium of Torture Treatment Programs is comprised of 27 member torture treatment programs throughout the country which share knowledge and expertise in order to foster the development, in quality as well as quantity, of specialized programs devoted to caring for survivors of torture. Together, they provide services to more than 2,500 torture survivors annually.

The Center for Justice and Accountability (CJA) is a non-governmental organization based in San Francisco that, among other activities, represents survivors of severe

human rights atrocities in civil suits against their persecutors who live in or visit the United States. CJA has pioneered an integrated approach to the quest for justice that combines legal representation with referrals for needed medical and psychosocial services, and outreach to schools, community organizations and the general public.